

The Appeals Board reviewed the record and adopted the stipulations listed in the Award.

ISSUES

The respondent and its insurance carrier request Appeals Board review of the findings and conclusions by the Administrative Law Judge relating to the nature and extent of claimant's disability and the award of interest.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Nature and extent of disability was not an issue before the Administrative Law Judge. The parties had stipulated that claimant was entitled to an award of permanent partial disability benefits based upon a 25.5 percent functional impairment to the left upper extremity. Respondent contends the Administrative Law Judge erred by using the weeks allowed for inclusion of the shoulder. Claimant's counsel agrees that the stipulation was to the upper extremity only and, therefore, the Administrative Law Judge should have awarded benefits based upon the 210 weeks allowed by the schedule for loss of use of an arm, excluding the shoulder, rather than the 225 weeks allowed for the loss of use of an arm including the shoulder. See K.S.A. 44-510d(a)(13).

The Appeals Board finds that the Award of permanent partial disability compensation should be modified to reflect the agreement of the parties.

The only issues before the Administrative Law Judge for determination were claimant's entitlement to post-award medical upon proper application and K.S.A. 44-512b interest. The Administrative Law Judge found no reason why claimant would not be entitled to post award medical treatment upon proper application and, awarded same. The Administrative Law Judge further found that because all of the relevant issues had been stipulated to at regular hearing, it was appropriate to award claimant interest pursuant to K.S.A. 44-512b on the amount of disability compensation due and unpaid from April 16, 1997, the date of the regular hearing.

K.S.A. 44-512b(a) provides as follows:

Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee **shall** be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest **shall** be assessed against the employer or insurance carrier liable for the compensation and **shall** accrue from the date such compensation was due. (Emphasis added.)

This statute requires interest whenever there is a finding that the employer or insurance carrier failed to pay compensation due a claimant absent “just cause or excuse” for such failure to pay prior to an award. Respondent admits in its brief that all facts necessary for an award in this matter were stipulated to at the prehearing settlement conference with the exception of the claimant’s average weekly wage and the claimant’s entitlement to future medical expense. There was a stipulation to average weekly wage at the regular hearing. The Administrative Law Judge delayed the effective date of the interest penalty until the date of the regular hearing because “the amount of compensation due could not be determined prior to the Regular Hearing because the issue pertaining to average weekly wage had not been decided.” Claimant does not dispute this finding. Therefore, if interest is awarded in this case, it will be from the date of the regular hearing.

Respondent makes essentially three arguments why it should not be assessed interest on the permanent partial disability compensation awarded in this case. First, claimant had been offered a lump-sum settlement that she refused because she was unwilling to forego the possibility of receiving future medical treatment at the expense of the employer and its insurance carrier. Instead, claimant insisted upon a running award which would leave open the possibility of her receiving medical treatment in the future. The Appeals Board does not consider a claimant’s failure to give up a benefit provided injured workers by the Workers Compensation Act to be just cause or excuse for respondent or its insurance carrier to refuse to make disability payments on an admittedly compensable claim where the nature and extent of disability has been established.

Second, respondent argues that an award of interest would deny respondent its right to raise the issue of future medical expense for determination by the Court. This argument is without merit. Voluntary payment of disability benefits does not preclude respondent from raising any issues at regular hearing, including future medical.

Third, respondent argues that because it retained claimant in its employ and thus claimant was not “starving and unemployed,” there is no justification for the award of interest. The Appeals Board also finds no merit in this argument. Claimant was entitled to the disability benefits regardless of her employment status.

The Appeals Board finds that there was not just cause or excuse for the failure of the employer or insurance carrier to pay the permanent partial disability compensation prior to the Award. The award of interest on the amount of the disability compensation due and unpaid from the date of the regular hearing is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated June 23, 1997, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Debra M. Ballinger, and against the respondent, Millbrook Offices - Kansas, and its insurance carrier, Old Republic Insurance Company, for an accidental injury which occurred August 6, 1994, and based upon an average weekly wage of \$351.38 for 4.89 weeks of temporary total disability compensation at the rate of \$234.27 per week or \$1,145.58, followed by 52.30 weeks at the rate of \$234.27 per week or \$12,252.32, for a 25.5% permanent partial scheduled disability, making a total award of \$13,397.90 plus interest, all of which is currently due and owing and ordered paid in one lump sum less any amounts previously paid.

All other findings, conclusions, and orders of the Administrative Law Judge are hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven R. Wilson, Wichita, KS
Stephen J. Jones, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director